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Silent Revolution: The Transformation of Divorce Law in the United States

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SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES. By Herbert Jacob. The University of Chicago Press, Chicago, Illinois: 1988. Pp. 209.

Reviewed by Marc G. Perlin*

As all beginning law students are taught, law develops both through the common law—the process by which judges “make” law in the context of deciding a particular case—and through the legislative process—the democratic method of law-making by the people themselves through their elected representatives.

In light of the vast differences between the way law is made by judges and by legislatures, it is not surprising that the voice of the public often has slight impact on the *judicial* process. In legal terminology, it is said that the public generally lacks standing to be heard in a particular case before a state or federal court. On the other hand, the public has come to expect that its voice *will* be heard during the formative stages of legislation, whether the legislation is being considered in a state legislature or in Congress. In fact, the public has come to expect that its voice will carry significant weight as law is being molded during the legislative process. Professor Jacob’s book, however, forcefully demonstrates just how wrong the assumption is that major policy changes in state social policy occur only after intensive debate and substantial public input during the legislative process.

Professor Jacob’s book examines three of the four significant developments to affect family law in this country during the twenty-year period beginning in the mid-1960s. These are: (1) adoption of irretrievable breakdown of the marriage (“no-fault”) as the principal ground for divorce; (2) the acceptance of the principle of equitable distribution of marital property at divorce; and (3) the recognition that neither the mother nor father of a child should have superior rights to custody of the child upon divorce and that *joint* parental custody should be considered as an alternative to the traditional arrangement which gives full custody to one parent and visitation rights to the other. The fourth significant development—the adoption of stricter child support enforcement tools by states at the urging of Congress—is barely discussed in the book, although this perhaps can be explained by the fact that a concerted effort to improve child support enforcement mechanisms in this country did not begin in earnest until the mid-1980s.¹

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1. H. JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED

The thesis of Professor Jacob's work is that significant legislative enactments which in recent years have had a substantial impact on society were promulgated only after intensive political debate and societal input.² Lobbying efforts by interested groups were commonplace and often critical during the time when these enactments were debated. Whether Congress was considering civil rights or fair housing laws in the 1960s, campaign funding legislation in the 1970s, or federal tax reform in the 1980s, it was clear that public debate, close scrutiny of the proposals, and lobbying efforts were the norm. After enactment, the public could not have been surprised by the significance of the new laws and the upheavals in social policies which they represented. In contrast, divorce reform, according to Professor Jacob, occurred silently in state legislatures. Absent was the public debate, the close scrutiny of the proposals, and the lobbying efforts by groups traditionally interested in legislation affecting the American family. Yet, the book contends, divorce reform has had as dramatic an impact on the public as has any of the other major legislative enactments of the 1960s, 1970s, and 1980s.³

Professor Jacob explains how this silent revolution occurred. He examines the role of a few influential law professors who convinced legislators in key states that the proposed changes in divorce law were not revolutionary, but rather would serve to make the law conform to the actual divorce practice which existed in the family courts of this country. For example, we are reminded that even though cruelty may have been required by state law to obtain a divorce, the evidentiary standard actually used in the courts to prove cruelty had become so relaxed that only rarely would a divorce be denied. In many such cases, we are told, the reason for the marital breakdown may have been incompatibility or irretrievable breakdown of the marriage, grounds not generally recognized by state law. Yet, cruelty would be alleged by one party's lawyer and accepted by the judge.

Professor Jacob shows how the support of the American Bar Association, an organization with a low public profile, was obtained and how the American Bar Association's approval brought about support for the changes on the part of state legislators. He explains the role of the little-known National Conference of Commissioners on Uniform State Laws in giving respectability to the proposals and bringing about the "quiet" divorce revolution of the 1970s and 1980s.

The book should serve as a valuable tool to the social scientist seeking an understanding of how the legislative process operates in this country. Despite an occasional lapse in accuracy (for example, the well-known 1979

STATES 132 (1988).

2. *Id.* at 15.

3. *Id.* at 78-79.

United States Supreme Court case of *Orr v. Orr*⁴ is referred to as dealing with Georgia's, rather than Alabama's alimony statute), the book should also be of interest to lawyers who practice in the family law area and to academics who may never have had the opportunity to reflect on the evolution of modern divorce law in this country.

4. 440 U.S. 268 (1979) (Alabama statutory scheme imposing alimony on husbands but not wives violates the equal protection clause.).

